BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID ALLEN MITTS	)	
Claimant	)	
VS.	)	
	)	Docket No. 189,398
WHITE STAR MACHINERY	)	
Respondent	)	
AND	)	
	)	
ITT HARTFORD	)	
Insurance Carrier	)	

ORDER

ON the 4th day of August, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of Preliminary Hearing Orders entered by Administrative Law Judge Shannon S. Krysl, dated July 8, 1994, and August 1, 1994, came on for oral argument in person in Wichita, Kansas..

APPEARANCES

The claimant appeared by and through his attorney, Joseph Seiwert of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, P. Kelly Donley of Wichita, Kansas. There were no other appearances.

RECORD

The record contained in this case consists of the documents on file with the Division of Workers Compensation, including the transcripts of Preliminary Hearings held on June 23, 1994, and July 26, 1994, before Administrative Law Judge Shannon S. Krysl, and the exhibits attached thereto.

ISSUES

Prior to the commencement of oral argument concerning these two preliminary hearing orders, the single issue as to whether claimant filed a timely written claim was raised by the respondent for the review of the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for preliminary hearing purposes, the Appeals Board finds as follows:

K.S.A. 44-534a(a)(2) grants the Appeals Board jurisdiction to review a preliminary hearing order entered by an Administrative Law Judge, if the issue of timely written claim is disputed.

The claimant was injured while working as a yardman for the respondent on April 5, 1993. While he was reaching into a crate to remove a bundle of six shovels, he felt a pop in his neck. The pain steadily increased and he sought medical treatment with Dr. Daniel H. Kelley, a chiropractor located in Valley Center, Kansas, on April 8, 1993. The respondent authorized this chiropractic treatment on April 9, 1993, in a note signed by the respondent which is contained in Dr. Kelley's medical records.

The last date that Dr. Kelley treated the claimant was April 21, 1993. Dr. Kelley was notified by the respondent or its insurance carrier that the claimant was incarcerated and that the file was being closed on April 27, 1993. Dr. Kelley, in a note dated April 27, 1993 to the respondent, indicated that the claimant would have been released for work on April 26, 1993, if his progress had been as expected. With about two more weeks of treatment the claimant would have met maximum medical improvement.

Claimant received a temporary total disability check for one week dated April 27, 1993. Claimant was incarcerated for a parole violation in California from April 1993 until March 26, 1994. He immediately returned to the Wichita, Kansas area after his release and contacted Dr. Kelley in reference to further treatment of his injury. Dr. Kelley told the claimant at that time that the respondent would not accept the charges for his medical care and such charges would have to come out of his own pocket. Claimant contends that until he returned to see Dr. Kelley in April 1994, he thought Dr. Kelley was still authorized to treat him for his neck injury.

As previously mentioned above, the last compensation which was provided to the claimant was a temporary total disability check for one week which was dated April 27, 1993. An Application for Hearing was filed by the claimant with the Division of Workers Compensation on April 25, 1994, which constitutes the written claim for compensation in this case. The employer filed an accident report with the Division of Workers Compensation on April 26, 1993, which was within twenty-eight days from the date of accident of April 5, 1993. K.S.A. 44-520a requires the claimant to serve upon the employer a written claim for compensation within two-hundred (200) days after the date of accident, or within two hundred (200) days after date of last payment of compensation. If the employer fails to file an accident report with the Director after the injured employee is given notice of such action, then the two-hundred (200) day time limit to serve a written claim is extended to one (1) year from the date of such accident, suspension of payment of disability compensation or the date of last medical treatment authorized by the employer. K.S.A. 44-557(a),(c).

The Administrative Law Judge, in her Preliminary Hearing Orders dated July 8, 1994 and August 1, 1994, found that the claimant had filed a timely written claim within two-hundred (200) days of his April 11, 1994 visit to Dr. Kelley, the authorized physician. She went on to find that Dr. Kelley's treatment constituted payment of compensation pursuant to Johnson v. Skelly Oil Company, 180 Kan. 275, 303 P.2d 172 (1956) and Blake v. Hutchinson Manufacturing Co., 213 Kan. 511, 516 P.2d 1008 (1973).

Upon review of the whole evidentiary record, the Appeals Board finds and concludes that the claimant did not serve a timely written claim for compensation on the respondent as required by K.S.A. 44-520a. The claimant last received a payment of compensation from the respondent on August 27, 1993, in the form of a check for temporary total benefits. He last received medical treatment from the authorized treating physician on April 21, 1993. The respondent filed a report of accident on April 25, 1993, so a written claim had to be served within two-hundred (200) days from the last payment of compensation which, in this case, was April 27, 1993. See K.S.A. 44-557(a),(c).

The Administrative Law Judge relies on the cases of Johnson and Blake for the principal that both Dr. Kelley and the claimant had to be notified by the respondent and its insurance carrier that Dr. Kelley was not authorized for further medical treatment or Dr. Kelley remained the authorized physician. She reasoned that since they were not notified of this fact, then when the claimant requested treatment from Dr. Kelley on April 11, 1994, this constituted payment of compensation and a written claim was timely filed in the form of an Application for Hearing on April 25, 1994.

In both the Johnson and the Blake cases, the claimant received continuous medical treatment from authorized physicians and a claim for compensation was filed within one-hundred twenty (120) days from the last medical treatment. The statute in effect at this time had a one-hundred twenty (120) day time requirement instead of the present two-hundred (200) days. In the instant case, more than two-hundred (200) days elapsed from the last payment of compensation, April 27, 1993, until the claimant again requested treatment from Dr. Kelley on April 11, 1994. The return of the claimant requesting medical treatment almost one (1) year after the respondent and its insurance carrier last paid compensation does not revive the claimant's right to file a written claim. See Rutledge v. Sandlin, 181 Kan. 369, 372, 310 P. 2d 950 (1957). Additionally, both Dr. Kelley and the claimant were notified by the respondent's insurance carrier that medical treatment was terminated. Dr. Kelley's note dated April 27, 1993, indicates he was told by either the respondent or its insurance carrier that the case was closed because the claimant was incarcerated. The claimant also testified that when he returned for medical treatment in April 1994, Dr. Kelley told him that the respondent would not pay for the medical treatment and such payment would come out of the claimant's pocket. The respondent's insurance carrier sent a letter to the claimant at his last known address on May 13, 1993, notifying the claimant that medical treatment was being terminated.

The respondent further argues that K.S.A. 60-515(a) applies to K.S.A. 44-509 which generally provides that no limitation of time shall run for an incapacitated person or minor under the Kansas Workers Compensation Act. The Appeals Board rejects this argument as K.S.A. 60-515(a) does not classify a person in prison as an incapacitated person. If the Workers Compensation Act intended for an incapacitated person also to mean a person in prison, then the Legislature would have so provided this designation in the statute.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Orders of Administrative Law Judge Shannon S. Krysl, dated July 8, 1994, and August 1, 1994, are hereby reversed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority decision of the Appeals Board and would find that claimant has proven timely written claim.

It is well settled that written claim need not take any particular form, and that we must examine the surrounding facts and circumstances to determine the parties' intentions. The written claim may be presented in any manner and through any person or agency. See Ours v. Lackey, 213 Kan. 72, 515 P.2d 1071 (1973).

As part of his treatment, claimant obtained written authorization from the respondent to obtain medical treatment from Dr. Daniel H. Kelley of Valley Center, Kansas. The document authorizing treatment is entitled "Employers Authorization" and provides: "This form when signed is your authority to examine and render treatment in accordance with the provisions of and under the conditions prescribed by the Workman's Compensation Act." The document is completed where it calls for the name of the injured employee, date of accident, name and address of the employer, and date and signature line for the authorized signatory. In addition to the written authorization for medical treatment, the authorized physician forwarded his medical bills and reports to respondent or its agents.

Although a file copy of the letter cannot be produced, the respondent and insurance carrier contend that the carrier sent a letter to claimant dated July 13, 1994, that stated, in pertinent part:

> "Based on the latest medical reports we have received, it appears that you are no longer needing medical treatment for this work related injury. If you disagree, please advise within the next two weeks.
>
> If we don't hear from you and you don't return to the authorized physician within this time frame, we will assume you are well, and will proceed to close your claim."

The above written communication by the worker's compensation insurance carrier's Senior Claims Representative establishes beyond any doubt that the parties had treated the exchange of documents as written claim, that the insurance carrier had opened a claim's file pertaining to the incident in question, and that the carrier was aware the claimant was making claim for compensation.

In addition to the other evidence presented that establishes the parties' intent, the undersigned would hold that under the facts presented the written acknowledgement of claim of the insurance carrier satisfies the requirement of written claim under the Act. The majority opinion appears to disregard the significance of this document and, in effect, holds that if it walks like a duck, quacks like a duck, and it's called a duck...then it's a goose.

_____
BOARD MEMBER

c: Joseph Seiwert, 2628 S. Oliver, Suite 104, Wichita, KS 67210
P. Kelly Donley, 300 W. Douglas, Suite 500, Wichita, KS 67202
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director